United States Court of Appeals
For the Ninth Circuit

No. 14805

AMERICAN PACIFIC DAIRY PRODUCTS, INC.,
a corporation, *Appellant,*
vs.
JOSEPH A. SICILIANO, *Appellee.*

JOSEPH A. SICILIANO, *Appellant,*
vs.
AMERICAN PACIFIC DAIRY PRODUCTS, INC.,
a corporation, *Appellee.*

No. 14806

AMERICAN PACIFIC DAIRY PRODUCTS, INC.,
a corporation, *Appellant,*
vs.
PACIFIC ENTERPRISES, INC., a corporation,
Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF GUAM

BRIEF OF APPELLANT AMERICAN PACIFIC DAIRY PRODUCTS, INC.

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THE ARGUS PRESS, SEATTLE

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Upon Appeal from the District Court of Guam

BRIEF OF APPELLANT AMERICAN PACIFIC DAIRY PRODUCTS, INC.

OPINIONS BELOW

The opinion of the District Court in Cause Number 14805 is found in the Transcript of the Record in that cause at page 96. There was no opinion filed in Cause Number 14806.

JURISDICTION

Jurisdiction is based on U.S.C. Title 48, Sec. 1424. Appeal to this Court is taken pursuant to U.S.C., Title 28, Sec. 1291.

QUESTIONS PRESENTED

1. What law governs the formation of a partnership agreement by ratification? The District Court did not discuss this point.

2. Can a corporation enter into a partnership agreement by the unauthorized action of its president when such a power is not authorized by its corporate articles? The District Court's finding on this is not clear since the District Court construed the liabilities to be the same whether there was a formal partnership or not.

3. Does the evidence establish that there was a formal partnership or does it establish a type of joint venture or *de facto* partnership at will by operation of law? The District Court did not decide this question since it considered the liabilities were the same in either situation.

4. Does a change of relationship of partners under the Civil Code of Guam caused by a breach of the agreement by one of the parties cause a dissolution? The District Court held it did not.

5. Can one partner who is not in default himself terminate a partnership at will or a partnership which has no fixed determinable time at any time under the Civil Code of Guam? The District Court did not decide this question.

6. When does dissolution of a partnership occur as opposed to winding up under the Guam Civil Code? The District Court of Guam did not distinguish between the dissolution of a partnership and its winding up.

7. Can a partnership be dissolved and its affairs

wound up without intervention of the court? The District Court did not recognize an out-of-court dissolution and termination of the partnership.

8. Is a partner deemed to have accepted the termination of a partnership by his silence and acquiescence in the terms of the offer of termination? The District Court found that the appellee had accepted his expulsion from the purported partnership but did not find an acceptance of the termination by the appellant.

9. How should the profits of a partnership be divided between the time of dissolution and the time of final winding up of the partnership? The District Court held that the terms of the original partnership agreement applied and the profits were divided 50-50.

10. Is a partner liable for interest on his share of a partnership which is left in the partnership during the period of the winding up of the partnership?

11. Does the evidence support a finding that the appellant ordered the building and materials which were charged to it by the appellee Pacific Enterprises, Inc.?

12. Is the appellant entitled to a jury trial on the suit for an open account on the Island of Guam either by common law or under the Federal Rules of Civil Procedure? The District Court held that it was not so entitled.

13. Was the appellant denied a fair trial by the court's refusal to grant a motion for a change of venue or for a continuance when certain of the appellant's records had not arrived on Guam?

14. Was the appellant denied a fair trial by the Dis-

trict Court allowing the same attorneys to represent the plaintiff and one of the co-defendants in Cause Number 14806? The District Court held it was a fair trial.

STATEMENT OF THE CASE

Any record references in this brief will be to the record in Cause Number 14805 unless a specific reference is made to Cause No. 14806, in the citation such as (R. 14806, p. 35).

This case involved appeals from the decisions of the District Court of Guam in two cases (being District Court Docket No. 59-54 and 68-54 of that court). The first of these cases was an action by Joseph A. Siciliano hereinafter referred to as the appellee, against American Pacific Dairy Products, Inc., hereinafter referred to as appellant, for the appointment of a receiver and for a partnership accounting. The second case, No. 68-54, is an action by Pacific Enterprises, Inc., a corporation, nearly all the shares of which are owned by Joseph A. Siciliano, against a purported partnership composed of Joseph A. Siciliano and American Pacific Dairy Products, Inc. (hereinafter referred to as the Dairy Queen). This second case is an action on an open account. The District Court of Guam ordered that any evidence produced in No. 59-54, which was material, should be considered in 68-54, and that further, the cases were consolidated for purposes of trial (R. 14806, 35).

The appellant is a corporation organized and existing under the laws of the State of Washington. Mr. Edward Thompson is President, and Mr. Herbert S. Little

is Secretary, and the stock of the corporation is held by a number of individuals, with no one stockholder owning more than 20% of its capital stock (R. 187, 188). This corporation was organized for the purpose of opening Dairy Queen stores on Guam and other Pacific Islands to sell at wholesale and retail, soft ice cream products made through the use of a patented process (R. 97).

Mr. Edward Thompson, President of the plaintiff, came to the Island of Guam late in 1950, or early in 1951, for the purpose of obtaining a site and conducting preliminary negotiations for the establishment of a Dairy Queen store. Mr. Thompson met Mr. Siciliano late in 1950, or early in 1951 on Guam, and at that time Mr. Siciliano was a successful business man on Guam known for his energy and business acumen and very friendly and co-operative toward Mr. Thompson (R. 139, 248-249). Mr. Thompson, on behalf of appellant, and the appellee, attempted to make some sort of satisfactory business arrangement regarding the opening of this Dairy Queen store, but finally were unable to do so since the appellee requested at least a 50% interest in the business (R. 141, 251, 317). Mr. Thompson did not want to negotiate on such a basis since none of the stockholders of the appellant had more than a 20% interest in the business (R. 249). The appellant, therefore, obtained a lease and proceeded to construct a store on Guam, known as the "Dairy Queen." It employed a part-time manager named Albert Slaughter and hired a group of Guamanians to complete the store and open the business (R. 317-320).

In June of 1952, Mr. Edward Thompson, President

of the appellant, again traveled from Seattle, Washington, to Guam to supervise the final finishing of the building and the opening of the store. In June, 1952, Mr. Slaughter informed Mr. Thompson that he would be unavailable to act any longer as manager of the store since he was going to Ethiopia, and, therefore, Mr. Thompson would have to obtain another manager (R. 318-319). Mr. Thompson again discussed with the appellee whether he would be interested in managing the business on Guam. During this period and before any agreement with the appellee was consumated, Mr. Thompson, acting on behalf of the appellant, opened the store on Guam on June 22, 1952 (R. 321).

The appellee refused to manage the business for less than a 50% interest and on June 23, 1952, Mr. Edward Thompson, and the appellee, executed a series of agreements which were filed by appellee's attorney. These agreements included a purported partnership agreement, an agreement on investment, assignment of several leases, and a certificate of co-partnership doing business under a fictitious name (R. 141-144, 253-257). Under these agreements the appellant was to contribute to a partnership the leases and building, the store equipment, franchises and supplies on hand, and the president of the appellant was to help with the buying of the supplies in the United States. The appellee refused to accept the $43,000 investment which the appellant had in the business as a basis for his investment and this figure was reduced by Mr. Thompson and appellee to $38,000.00 and this $38,000.00 was further reduced to $30,000 by the requirement that the appellant would carry $8,026.00 as an account payable to it which

was to be paid out of profits of the business if any were earned. The purported agreement provided that the appellee was to advance $15,000 in cash to the appellant for a 50% interest in the business, and the appellee was to receive a salary during the period that he acted as manager of the partnership (R. 97-98). The proposed agreement contemplated that appellee would promote new outlets with an increase in salary as additional outlets should be opened. The appellee agreed to devote such time to managing the business as might be mutually agreed upon *"together with his skill and energy* to the best interest of the business of the partnership" (R. 97-98). The appellee advanced $15,000 in cash to Mr. Thompson, but $7,500 of this was immediately loaned by appellant to the Dairy Queen on Guam to be used as operating capital (R. 323).

Mr. Edward Thompson left the agreements with the appellee's attorney, Mr. Lyle Turner, on Guam, since there were some typographical errors which had to be corrected. These documents remained on Guam in the possession of Mr. Turner until the middle of July, 1952 (R. 329, 330).

After completing the opening of the store and executing the above agreements, Mr. Thompson left the Island of Guam and returned to the United States. For a period of eight or nine days the appellee managed the business.

On July 2, 1952, nine days after executing the above agreements, the appellee left the Island of Guam and came to the United States and remained continuously away from the Island of Guam and in the United States

for a period of more than two years. Upon arriving in the United States on July 2, 1952, the appellee called Mr. Thompson, the president of the appellant, at 3:00 in the morning, and informed him that he was in the United States but would be returning to Guam within a very short period of time but this turned out to be a period of two years (R. 99-100, 328).

After this, in the middle of July, 1952, Mr. Thompson, the president of the appellant, received the agreements which had been executed on Guam (R. 329). In August, 1952, he presented this matter to the Board of Directors of the appellant. But since the appellee was not on the Island of Guam, managing the business, the Directors preferred not to act on the agreements until it could be ascertained whether the appellee would be able to fulfill his part of the agreement (R. 330). It was suggested that the matter be held up a few weeks and this was done and no further action was taken by the Board of Directors of the appellant until Oct. 6, 1952 (R. 330).

On October 6, 1952, a resolution was passed stating that the partnership agreement was ratified only if certain conditions were met, including the return of Joseph A. Siciliano to Guam. A copy of this resolution was sent to the appellee and received by him (See Def. Ex. E, R. 343) (R. 46 and 48). Several days later a personal letter was sent by Mr. Edward Thompson to the appellee's attorney on Guam, stating that Mr. Thompson and two of the other directors of the appellant, while discussing other matters, had generally approved the agreement (Pl. Ex. 7, R. 382).

The appellee did nothing with respect to the resolution of October 6, 1952, and during the next few months did not inform the appellant of what his future plans would be. From July, 1952, until April, 1953, the appellant attempted continually to persuade the appellee to return to Guam. The appellant was informed that the appellee was having marital difficulties and Mr. Thompson, the president of the appellant, wrote to the appellee's attorney, stating that if the 60-day requirement of the October 6, 1952, conditional ratification was too difficult, he would attempt to persuade the Board of Directors of the appellant to extend this time to 90 or even 120 days (R. 328-329). The appellee did not reply to these requests, and on April 4, 1953, the Board of Directors of the appellant adopted a Resolution, setting forth the background of the *de facto* partnership and stating that since Mr. Siciliano had not replied to their previous letters, or met the conditions set forth in the conditional ratification of Oct. 6, 1952, and since he evidently was not going to return to Guam in the near future, that the Board refuse to ratify the proposed agreement and the *de facto* partnership was terminated as of April 21, 1953, and appellee's $15,000 investment, less damages he might have caused, was tendered to him (Def. Ex. F, R. 344; R. 59-67, Ex. E attached to answer). A copy of this Resolution, as set forth in the pleadings, was mailed to the appellee and received by him (R. 48, 68). At the time of this Resolution the appellant tendered to the appellee or the receiver in the action of *Siciliano v. Siciliano,* the sum of $15,000, but were not able to physically tender this money to the appellee since there was considerable confusion on

Guam in the appellee's affairs, and no one knew to whom the money should be formally presented (R. 269-270, 385).

After adopting this resolution the appellant appointed Mr. Norman Thompson as manager of the Dairy Queen store on Guam. Mr. Norman Thompson arrived on Guam on April 22, 1953, and within a few days had taken complete charge of the books and operations of the Dairy Queen Store on Guam (R. 297, 383, 394).

In June, 1953, the books of the Dairy Queen of Guam, which had been kept on a partnership basis by an employee of the appellee, were forwarded to the United States, and Mr. Edward Thompson, the president of the appellant, established a new set of books based on the Dairy Queen store operating as a corporate enterprise starting Sept. 1, and ending August 31st of each year.

During the period from July 2, 1952, when the appellee left the Island of Guam until April, 1953, when Mr. Norman Thompson took over the management of the business, the Dairy Queen store was operated by Filipino employees (R. 153-155). The men were brought to Guam by Pacific Enterprises, Inc., a corporation wholly owned by the appellee except for a few qualifying shares. There was no direct management of the store, but Henry Diza, a bookkeeper of Pacific Enterprises, Inc., kept some books for the operation and Joseph Meggo, an employee of Pacific Enterprises, Inc., supervised the employees (R. 166, 171, 185, 275). Pacific Enterprises, Inc., presented a bill for all the services rendered by anyone and appellant has offered to pay all

the legitimate charges for subsistence, wages and housing for all employees for materials furnished (R. 14806, 4-14, 60, 61, 225).

The appellant had to finally completely take over the operations to protect itself. The appellee did not object to this and did not file suit until Sept., 1954 (R. 101-103).

When the appellant's manager arrived on Guam, the conditions were very bad in the store. Among such conditions, as listed in trial court's findings were (R. 101-102):

(a) The sanitary conditions at the store were not good.

(b) The cash receipts were not deposited daily but the bags containing returns were kept in the safe with Pacific Enterprise's funds, often in large amounts.

(c) The books of the purported partnership had not been posted for a long period of time.

(d) There was an intermingling of accounts in that Pacific Enterprises, Inc., was furnishing supplies and services for which no charges were being posted.

(e) The store was operated irregularly and with insufficient controls.

(f) The cash register had broken down and was not replaced or repaired for a long period.

During this period the President of the appellant, Mr. Edward Thompson, did all the main purchasing for the operation (R. 330) and was forced to travel to the Island of Guam in December, 1952, to straighten out the operation (R. 335-338).

The Filipino bookkeeper in charge of obtaining supplies, paying bills and handlng the cash sent reports to Edward Thompson (R. 280-281). These were often late. Mr. Edward Thompson would send invoices for supplies, checks for payment of expenses and letters on the operation to this employee (R. 171, 295, 297, 298). The bookkeeper understood that the Dairy Queen was not part of the Pacific Enterprises organization (R. 295).

During this period the appellee, Joseph Siciliano, did not send any instructions to the man in charge of buying supplies, paying expenses, accounting for the cash, and keeping the books and the employee didn't make any reports to him (R. 294). The employee in direct charge of the other employees did not even make a written report to the appellee or receive any written instructions from him and during two years only talked to him on the telephone twice (R. 179). The appellee did nothing else in the way of managing the Dairy Queen store after July 1, 1952.

During the period of operation by Mr. Edward Thompson and employees connected with Pacific Enterprises, Inc., the sale of soft ice cream products was new on the Island of Guam and was very successful. The success of the business from the latter part of 1953 to date has depended upon business conditions upon Guam which suffered several major drops because of business conditions on Guam and the construction program of the United States Government.

Several months after termination of the *de facto* arrangement, starting in November, 1953, the appellant began its program of expansion to additional stores

which had been contemplated at the time of the original meeting with the appellee, but which had not been started prior to this time because of the difficulties suffered by the Dairy Queen (R. 10, 239). This expansion took the form of the building of another store by means of a corporation known as Guam Frozen Products, Inc., which is partially owned by appellant and partially by several other individuals (R. 243-246, 265). This store has purchased some supplies from American Pacific Dairy Products, Inc., and Norman Thompson, the manager of the store.

Immediately after Mr. Edward Thompson left the Island of Guam in 1952, the appellee constructed a building on the Dairy Queen property adjacent to the Dairy Queen store (R. 99). The appellee states that he had told Mr. Edward Thompson about this building but Mr. Edward Thompson denied it (R. 99). There was conflicting testimony as to the purpose of this building, but it was to sell some type of food product other than soft ice cream. When Edward Thompson discovered that this building was being built (the Fuller Co. in San Francisco sent him an invoice for glass to be placed in the building), he refused to honor the invoice for the glass and told Mr. Siciliano that he did not want the building (R. 14806, 71-79). This building was never finished for the purposes above stated and remained vacant for nearly two years. In November, 1953, Mr. Norman Thompson asked whether he might not repair this building himself and make some use of it. Edward Thompson, President of the appellant, told Norman Thompson that he could do what he wanted with it but that he took the risk of losing his

money since the appellant denied all interest in it (R. 14806, p. 71) (R. 341). Mr. Norman Thompson did repair the building and at the present time is using it as his living quarters. There is no connection between these two buildings other than the going out the back door of one and entering the back door of the other (R. 14806, 165, 169).

During the period from June, 1952, to April, 1953, Pacific Enterprises, Inc., a corporation owned by the appellee, Siciliano, was supplying items and equipment to the Dairy Queen store. The second case involved in this appeal is a suit on an open account by Pacific Enterprises, Inc., against Joseph Siciliano and American Pacific Dairy Products, doing business as the Dairy Queen of Guam.

Pacific Enterprises, Inc., did not have an account for the Dairy Queen of Guam during this period and did not create an account on its books for many items until August, 1954, just prior to the bringing of the suit. No bill was rendered to the Dairy Queen until many months after the services were rendered.

The parties agreed upon certain items, but many items in the bill were dropped as being unable to be substantiated or because they were greatly inflated. The remaining items in dispute concern the rent charged for a refrigerator truck, the delivery of some crushed coral, the charging to the Dairy Queen of certain equipment alleged to have been supplied from Pacific Enterprises, Inc., equipment and a charge of $2,300 allowed by the court as a cost of the additional building and a cesspool behind the building. The appellant denies any interest

in the building or any rent for the refrigerator truck and denies the other items were supplied.

The court stated in its interlocutory judgment that an independent accountant would audit the books of the corporation and the Dairy Queen and would establish a figure for net profits. This was not done, but instead the court accepted the reports of the Pacific Enterprises, Inc., employees as to the net profits and expenses of the Dairy Queen and granted judgment to the appellee, Joseph Siciliano, in the action for an accounting based on the profits reported by Henry Diza.

The court granted judgment for the appellee, Joseph A. Siciliano, in the action for an accounting in the sum of $34,376.95, together with interest at 6% from July 1, 1953, to the date of entry of judgment. This amount was computed as follows:

(a) Return of capital	$15,000.00
(b) Capital improvements paid out of profits	4,000.00
(c) One-half value of additional building	1,150.00
(d) One-half net profit	16,876.75
	$37,026.75
Less one-half Pacific Enterprise judgment after deducting $1,234.95 for subsistence paid after July 1, 1953	2,649.80
Balance	$34,376.95

The court granted judgment in the case of *Pacific Enterprises, Inc. v. American Pacific Dairy Products, Inc.,* in the sum of $6,534.44, which was based upon a

finding of an account due Pacific Enterprises, Inc., in the sum of $7,600.83, less a set-off of $1,066.28, leaving a net of $6,534.55. This amount included $2,300.00 for the building constructed by Pacific Enterprises, Inc., $400.00 for the rent of a refrigerator truck, $180.30 for the equipment furnished and $24.11 for other miscellaneous expenses all of which were denied by the appellant and are appealed.

SPECIFICATION OF ERRORS

Appellants rely upon the following errors of the court below:

1. The court erred in entering judgment for the plaintiff against the defendant in Cause No. 14805 (R. 14805, p. 114-115), in that such decree is not supported b ythe evidence nor by the findings of fact and conclusions of law.

2. The court erred in entering judgment for the plaintiff against the defendant American Pacific Dairy Products in Cause No. 14806 (R. 14806, p. 49), in that such decree is not supported by the evidence nor by the findings of fact and conclusions of law.

3. The court erred in finding there was some type of formal partnership or in treating the relationship between the parties as a formal partnership when none actually existed (R. 14805, p. 103, 114).

4. The court erred in holding that the partnership had been ratified by the defendant (R. 14805, p. 100) as such conclusion is contrary to the law and the weight of competent evidence in that there is no evidence to support a finding of ratification other than the conditional ratification set forth in defendant's Exhibit E.

5. The court erred in ignoring the separate corporate entity of the defendant corporations and in admitting in evidence plaintiff's Exhibit 7 (R. 381) and in concluding that exhibit showed corporate ratification (R. 14805, p. 101) in that said admission and conclusion are contrary to law and the weight of competent evidence.

6. The court erred in concluding that the plaintiff continued as a full partner until July 1, 1953 (R. 14805, p. 108, 113) although he breached the agreement as of July 1, 1952, as such conclusion is contrary to law and is not supported by the weight of competent evidence.

7. The court erred in making supplemental finding of fact number 2 (R. 14805, p. 110) on the ground that said finding is contrary to the evidence.

8. The court erred in making supplemental finding of fact number 4 (R. 14805, p. 111) that the total undistributed profit as of July 1, 1953, was $33,753.49 as this was contrary to the evidence and included the sum of $2,350.00 which was arbitrarily established by the court without the support of any evidence.

9. The court erred in entering supplemental finding of fact number 6 (R. 14805, p. 111) in that it was contrary to the evidence that the sum of $8,000.00 was paid out of gross profits, and increased capital assets.

10. The court erred in entering supplemental finding of fact number 10 (R. 14805, p. 112) and conclusion of law number 4 (R. 14805, p. 113) that the plaintiff was entitled to $34,376.95 as his share of the purported partnership as the said finding and conclusion of law are contrary to law and contrary to the weight of competent evidence particularly as regards items (b), (c),

(d) and the amount of the judgment which reduced these items.

11.The court erred in entering supplemental finding of fact number 11 (R. 14805, p. 113) and supplemental conclusion of law number 4 (R. 14805, p. 113) that plaintiff was entitled to interest on the amount of $34,-376.95 at the rate of 6% from July 1, 1953, to the date of the entry of the judgment, as such is contrary to law and to the weight of the evidence.

12. The court erred in granting to the plaintiff a full 50-50 share of the profits from July 1, 1952, until July 1, 1953 (R. 14805, p. 112), as this was contrary to law and to the weight of competent evidence since even if there was some type of partnership the plaintiff was only entitled to a proportionate share of the profits.

13. The court erred in both cause No. 14805 and cause No. 14806 in denying defendant's motion for a continuance and for a change of venue.

14. The court erred in entering Supplemental Findings of Fact and Conclusions of Law and Final Judgment on April 7, 1955, without notice to defendant contrary to the terms of the Interlocutory Judgment entered the 18th day of February, 1955, providing for an accounting between the respective parties (R. 114-115).

15. The court erred (Cause No. 14806) in permitting attorneys for the plaintiff to represent the co-defendant Joseph Siciliano and in denying defendant American Pacific Dairy Products' motion for severance (R. 14806, pp. 40-41).

16. The court erred in not dismissing the plaintiff's

claim in Cause No. 14806 *in toto* and particularly Items IV, XI, XII (R. 14806, pp. 5-8) and the addition to the building (R. 14806, p. 235) since these items were not supported by the weight of competent evidence and are contrary to law.

17. The court erred in not filing findings of fact and conclusions of law in cause No. 14806.

18. The court erred in denying the defendant American Pacific Dairy Products' demand for jury trial as such a denial was contrary to law.

19. The trial court erred in applying the law of Guam to determine if there was a formal partnership as such method was contrary to law.

SUMMARY OF ARGUMENT

The trial court should have used the law of the State of Washington as the place of ratification to determine if there has been a partnership agreement established.

There was never a formal partnership agreement between the parties because the appellant never ratified the proposd partnership.

There was a *de facto* partnership or joint venture between the parties starting June 23, 1952, with the appellee to act as manager, but this was dissolved by the appellee's breach of agreement on July 1, 1952, when he left the island of Guam.

After the dissolution of the partnership, the appellant continued the business with the help of Filipino employees, some of whom were connected with the corporation known as Pacific Enterprises, most of the

stock of which is owned by the appellee. The appellee did not give any instructions or do any managing of the business.

The appellant continued to manage the business with the Filipino employees from July 1, 1952, until April 21, 1953. During this period the appellant's president tried repeatedly to persuade the appellee to return so that the partnership agreement could be ratified according to its original terms but the appellee did nothing. Pacific Enterprises has rendered a bill for all materials furnished and services performed.

On April 21, 1953, the appellant sent a notice of termination to the appellee, attempted to tender his capital contribution to him, placed its own manager in the store and completely took over the business. The appellee accepted this by his silence in not replying to appellant's notice.

The appellant did not get its books finally set up on a corporate basis until July 1, 1953, but this was because the appellant's offices are in Seattle, Washington, and the operation is on Guam.

The appellant's position is that the *de facto* partnership was dissolved on July 1, 1952, by the appellee's breach of the agreement and therefore appellee is only entitled to:

Capital contribution	$15,000.00
50% of profits June 22 to July 1, 1952	Nil
Less damages (None proven)	Nil
Net balance	$15,000.00

This is based on Sec. 2324 of the Civil Code of Guam that the partner who causes a dissolution of a partnership by his fault is entitled to the value of his partnership interest on the date of dissolution without any amount to be given for good will. The appellant's position with regard to profits after dissolution is that the appellee by his action in refusing to comply with the agreement or reply to appellant's attempts to settle the matter has forfeited his right to any profits for the period after dissolution, and by his silence accepted the appellant's offer to return his capital contribution.

If the court should decide that the appellee has not by his actions forfeited all right to profits, then the appellee would be entitled to share in the profits according to his proportionate capital contribution from the date of dissolution until the partnership was wound up by the appellant's tender and termination on April 21, 1953. The appellant contributed $42,500.00 worth of assets to the business and the appellee $15,000.00. Therefore, appellee would be entitled to:

Capital contribution	$15,000.00
($15,000 / ($57,500 x (profits to April 30, 1953))	8,013.99
or	
(26% x $30,823.04)	
Total	$23,013.99

Less any Pacific Enterprises judgment.

The appellant's position is that this is the proper way to compute the judgment, but even if the trial court's method of using July 1, 1953, should be used, the trial court erred in simply creating profit figures of

$2,350.00 for the month of June, 1953, and in accepting Henry Diza's figures for profits of $31,403.47 without having an audit made.

Even if the trial court's method and termination date should be used, the trial court improperly computed the judgment. The court added one-half of $8,000.00 worth of assets on the theory that profits had been reduced in this amount, and $1,150.00 as one-half the value of a building which appellant didn't order and doesn't want. In addition, the court failed to take into account in the Pacific Enterprises judgment reducing the court's judgment in the accounting case $1,066.28 of expenses which were paid for by a set-off.

In the Pacific Enterprises suit Cause No. 14806 the trial court based the judgment as a whole on very unsubstantial evidence. The appellant appeals only as to four items. The rental of a refrigerator truck which was never ordered by appellant and never needed. Two different sets of materials which were not shown to have ever been supplied or needed. Finally the charge by the trial court of $2,300.00 for an addition to the appellant's building which was built by the appellee for his own purposes, never used by the appellant, and which appellant does not now want.

The appellant also urges that the trial court did not grant the appellant a fair trial. The appellant's demand for jury trial in Cause No. 14806 was improperly denied. The appellant's request for a change of venue and a continuance in both Cause No. 14805 and 14806 was denied and appellant could not obtain all of its records in time to present them at the trial. The trial

judge allowed the same attorneys to represent both the plaintiff and the co-defendant Joseph Siciliano in Cause No. 14806. Finally in Cause No. 14805 it had been decreed by the judge in the Interlocutory Judgment that there would be an accountant appointed to establish the books and the profit figures involved. This was never done and the court filed its Supplemental Findings of Fact and Conclusions of Law and Final Judgment without giving the defendant notice of said action.

ARGUMENT

I.

The Trial Court Should Have Used the Law of the State of Washington to Determine If There Was a Formal Partnership, and If No Formal Partnership Existed, Then the Law of Guam to Determine the Effect of the Appellant's Actions on Guam

A. The law of the forum decides as a preliminary question by the law of which state questions concerning the formation of a contract are to be determined.

The trial of these cases took place on the Island of Guam, and the trial court should have decided as a preliminary question the law of which state determined the formation of a partnership contract. Restatement, Conflict of Laws, Sec. 311.

The appellant has not been able to find any cases from the Territory of Guam determining the conflict of law question as to which state law determines if a partnership agreement has been consummated. Therefore, the appellant has consulted the general reference works such as the Restatement, Conflict of Laws (1934)

to establish the proper conflict rule which should have been applied by the trial court.

B. The partnership relationship requires that the parties thereto agree to it under established principles of contract law.

A contract, express or implied, is essential to the formation of a partnership. See Guam Civil Code, Section 2400. See also California Corporation Code, Section 15006, and cases cited in II. of this brief.

Certain rights and liabilities of a partnership nature can be imposed upon a party without a contract but in order to have a *de jure* partnership the elements of a contract must be present.

C. The obligations of partners are determined by the law of the place where the agreement of partnership was made.

The creation of a partnership by contract between the parties is determined by the law of the place where the agreement of partnership is made. Restatement, Conflict of Laws, Sec. 342. Comment (a) states in part with regard to partnerships:

> "Such an agreement involves a manifestation of willingness to enter the relationship by one party and an acceptance thereof by the other. If the relationship is created by an agreement which is binding as a contract, the obligations of the parties as between themselves are governed by the law of the place of contracting. If the agreement does not constitute a contract, the obligation of the parties as between themselves are governed by the law of the place of agreement."

D. The "law of the place of contracting" is the law of that state where the final action takes place which is necessary to form a contract.

There are several theories as to which law should be used in determining the validity of a contract. The Restatement, Conflict of Laws; Professor Beale, in his article, *"What Law Governs the Validity of a Contract,"* 23 Harvard Law Review 1, 79, 194, 260; and Judge Goodrich in Goodrich, Conflict of Laws (3rd Edition, 1951), page 323, all favor the rule of the "Place of Making" approach to the problem. The second theory is to use the "place of performance." The third approach is to use the "intention of the parties." The fourth approach is to use the "law which upholds the contract." The text writers and authorities seem to be generally agreed that the "place of making" of the contract is most generally followed by the courts now with the place of performance coming second, and the other two theories third and fourth, respectively.

As pointed out previously the partnership relation is a contractual relationship and, therefore, the principles applicable to contracts should be applied to determine if a contract of partnership was established.

The "law of the place of contracting" determines the validity and effect of a promise with respect to mutual assent or the absolute or conditional character of the promise. Restatement, Conflict of Laws, Sec. 332. The determination of the "place of contracting" is the place in which under the general law of contracts, the principal event necessary to make a contract occurs. Restatement, Conflict of Laws, Sec. 311, Comment (d).

When an acceptance is sent from one state to another with the intention of forming a bi-lateral contract the "place of contracting" is the state from which the acceptance is sent, unless delivered by an agent directly. Restatement, Conflict of Laws, Sec. 326.

E. The law of the place of ratification determines if a contract has been formed.

There is no established rule for determining the "place of contracting" when a ratification of the contract is necessary. If a contract were made through an authorized agent, acting contrary to his instructions, and ratified by the principal, the place of contracting is where the agent acted. Restatement, Conflict of Laws, Sec. 331. However, when an agent acts contrary to his instructions and the principal does not ratify, it would seem that there is no contract and therefore whether a contract is formed would have to be determined at the point of ratification. As stated by Prof. Stumberg in Stumberg, Principles of Conflict of Laws (2nd Edition, 1951) at page 230:

> "Some difficulty might be encountered when an unauthorized agent acts in one state, but his acts are ratified in another. It would seem that the ratification is the event which 'creates the obligation.' The principal has exercised in the state where he ratifies, a power which brings the contract into life.[30] Yet the place of contracting is said in the restatement to be where the agent acted.
>
> "([30]) If the principal does not ratify there is no contract. Ratification is, therefore, the event which creates the contract."

It is the appellant's position, therefore, that the

"law of the place of contracting" on a contract which requires ratification, is the law of the state in which the ratification must take place and that state must be referred to to determine whether or not a contract was formed by the ratification. Restatement, Conflict of Laws, Sec. 331.

F. The law of the state of appointment of the agent determines the scope of his authority and the necessity for ratification.

The obligation of a principal and his agent as between themselves is determined by the law of the place where the agreement of agency was made. Restatement, Conflict of Laws, Secs. 342 and 343 and 345. The relationship between the corporate president and his corporation as to whether his actions were authorized would, therefore, be determined by the place of appointment of the corporate agent which, in this case, was the State of Washington.

G. Ratification of the contract was required since the president of the appellant was not authorized to enter into a partnership agreement and, therefore, the law of the place of ratification is the law of the "place of contracting" which determines whether a contract of partnership was formed.

It is the position of the appellant that under the law of the State of Washington, or under the law of the Territory of Guam, ratification of the corporate president's actions was required in order to establish a formal contract. See cases cited in Part II of this brief. The Board of Directors of the appellant and most of the stockholders of the appellant are in the State of

Washington, and ratification was, therefore, required in the State of Washington.

H. The law of the State of Washington, therefore, determines if ratification was necessary and if a formal contract of partnership was consummated.

As pointed out previously the law of "the law of the place of contracting" for a partnership determines if there has been partnership formed and the "place of contracting" is "the place of ratification" when ratification is required. The law of "the place of ratification," therefore, determines if a contract has been formed. Therefore, the law of the State of Washington determines if a contract of partnership was ever created by ratification.

I. If there was no authorization to act the law of the place of the act which was Guam determines the effect of the corporate president's action.

If the action of the corporate president was not authorized and, therefore, no contract of partnership was formed the corporation may still be held liable for the effect of its actions. If this is done the law of the place of the corporate agent's action determines its effect. Restatement, Conflict of Laws, Sec. 166, Comment (c).

II.

No Formal Partnership Agreement Existed Between Appellant and Appellee

There seems to be no doubt that there must be a contract, express or implied, between two parties in order to create a partnership.

The State of Washington has adopted the Uniform

Partnership Act and its decisions follow the general rules regarding the necessity of a contract to establish a partnership. The general rule is well stated in 40 Am. Jur., Partnerships, Sec. 17:

> "One of the chief characteristics of the partnership relation is that it is created only by the voluntary contract of the parties. In fact, in practically all definitions of partnership an element of contract is fundamental. An actual partnership relation does not arise by operation of law in any case; persons do not become partners except by agreement, express or implied, nor can a new partner be introduced in a partnership except by consent of the members. A partnership liability may be imposed upon a person under principles of estoppel, where he holds himself out or permits himself to be held out as a partner in an enterprise. In such cases there is no actual or legal partnership relation, but merely a partnership liability imposed by law in favor of third persons."

In this connection see also 40 Am. Jur., Sec. 23.

See also Guam Civil Code, Sec. 2400, California Civil Code, Sec. 15006, and Crane Handbook on Partnerships (Hornbook Series, 1938) Sec. 5, page No. 20.

A. A trial court did not find there was a formal partnership and did not consider such a finding necessary to support his decision.

The trial court was not completely clear in its opinion and findings of fact as to whether it considered that a formal partnership existed or whether it was holding the appellant on the basis of an implied partnership or on a liability created by operation of law. The court's remarks and findings taken as a whole, however, seem to reflect a finding of no partnership.

The trial court rejected as a "fiction" the appellant's argument that a ratification of the formal partnership agreement was necessary in order to create the partnership (R. 100, R. 381). The court, however, did not find that there was a formal partnership between the parties. In its informal remarks to counsel the court stated as follows:

> "It is my view that this partnership agreement, so-called, is not authorized in law. So far as I can determine the articles of incorporation of the defendant do not authorize it to enter into partnership agreement, * * * If it is not a partnership, it is a joint enterprise. I think it is a joint enterprise entered into between the parties. I think that joint enterprise ceased as of the time the corporation took over effective control of the partnership and excluded Mr. Siciliano." (R. 459)

The court reaffirmed its informal remarks in the opinion filed on March 2, 1955, wherein the court states:

> "In the court's view, whether this was a partnership or a joint venture, the rights of the parties are governed by Sec. 2432, Civil Code of Guam." (R. 103)

In the final judgment rendered in this cause on April 7, 1955, the court seems to still be following the theory that this was not a formal partnership, since in part (1) of the judgment the court ordered, adjudged and decreed as follows:

> "1. The copartnership or joint venture heretofore existing between Joseph A. Siciliano and American Pacific Dairy Products, Inc., is herewith dissolved as between the parties as of July 1, 1953." (R. 114)

Appellant urges that a finding of no partnership is the correct one.

B. The appellant, a corporation, was not authorized to enter into a partnership agreement under the law of the state of its incorporation.

In the first section of this argument it is established that the law of the place of incorporation determines the powers and purposes of the corporation and that the law of the place of contracting determines whether the parties had capacity to contract and whether a contract was validly formed. Restatement, Conflict of Laws, Sec. 156. The statutes of the State of Washington provide that a corporation has the right to act as a natural person, but only authority to perform such acts as necessary or appropos to its purposes and not repugnant to law. Revised Code of Washington, Sec. 23.08.070. Appellant has discovered no Washington cases construing this section regarding partnerships but the annotation in 80 A.L.R. 1049 is referred to as stating the general rule that a corporation is not authorized to enter into a partnership unless it is expressly set forth in its Articles. See 13 Am. Jur. Partnership, Sec. 823 and 824. See Fletcher Cyclopedia of Incorporations, Sec. 2520; see also Crane Handbook on Partnership, *supra,* Sec. 9 at page 34.

C. The president of the appellant was not impliedly authorized to enter into a partnership agreement, and, therefore, his act required ratification by the board of directors of the appellant.

As is pointed out in Sec. 1 of this Argument, the law of the place of the agency agreement determines the ef-

fect of that agreement and, therefore, the law of the State of Washington determines whether the corporation president was impliedly authorized to enter into a partnership agreement. There is no Washington case directly in point on the power of the president of a corporation to enter into a partnership agreement, but the Washington court has stated that the powers of a corporate president are very limited and an examination of the most pertinent cases would seem to indicate that placing the corporation into a partnership would be beyond the scope of any implied power of the president. See *Reuter Organ Co. v. First Methodist Episcopal Church of Kelso,* 7 Wn.2d 310, 109 P.2d, 798. For a further exposition of this general rule see Fletcher, Cyclopedia of Corporations, Volume II, Sec. 622.

D. The facts of the case at bar lead to the conclusion that the contract of partnership signed by the corporate president was not authorized and that ratification by the board of directors of the corporation was necessary to establish a formal partnership agreement.

The articles of incorporation of American Pacific Dairy Products, Inc., do not authorize the corporation to enter into a partnership arrangement (Defendant's Exhib. "A") (R. 342). This was found also by the trial court (R. 459). There is nothing in the record to indicate that Edward Thompson, the president of the appellant, was authorized by the Board of Directors of the appellant, at any time, to enter into a partnership arrangement with the appellee. The facts of this case establish the contrary position since it is undisputed

that Edward Thompson, president of the appellant, went to the Island of Guam in June, 1952, to direct the operations of opening a Dairy Queen Store, which, at that time, had a manager named Mr. Slaughter (R. 251, 318). The operation at that time did not contemplate the appellant entering into a partnership with anyone, but rather that the store would be operated by an employee of the corporation. This was not changed until Mr. Thompson, the president of the appellant, arrived on the Island of Guam in June, 1952, and was informed by Mr. Slaughter that he would not be able to act as manager, and, therefore, the corporation needed another manager (R. 318). This is found as a fact by the court as shown by its opinion wherein it is stated:

> "As the store was nearing completion in June, 1953 (*Sic* 1952), Edward Thompson again came to Guam and learned that the part-time manager would not be available. As he was impressed by the plaintiff's business ability, he offered, and the plaintiff accepted a 50% interest in the business. Thompson, acting for the defendant corporation, entered into a co-partnership agreement with the plaintiff under the terms of which each partner paid into the partnership $15,000.00 in cash, or other assets." (R. 97-98)

There is nothing in the record to support the court's finding that Edward Thompson, the president of the appellant, was authorized to act for the defendant corporation, but rather the entire record establishes that the appellant at all times considered ratification of the agreement necessary. This is shown by the fact that the *appellee's* attorney corrected the partnership agree-

ments and forwarded them to the United States after making some typographical corrections (R. 329). These papers did not arrive in the United States until after the 16th day of July, and, therefore, the appellant's board of directors would have had no chance to examine or act upon these documents until after the middle of July (R. 329). At this time Mr. Siciliano was absent from the Island of Guam, and, therefore, the board of directors of the appellant did not take immediate action upon the documents until it could be seen whether or not Mr. Siciliano would immediately return to Guam as he had promised (R. 330). The board of directors of the appellant did meet on October 6, 1952, and refused to ratify the partnership agreement but instead stated they would ratify only on the condition that Mr. Siciliano (the appellee) return to the Island of Guam and comply with certain other conditions (Def. Exh. "E") (R. 343). It is admitted by the pleadings that a copy of this resolution was sent to the appellee and received by him (R. 46) (R. 68).

The appellee attempted to show that this ratification was not a valid action of the board of directors by introducing a personal letter written by the president of the appellant to the attorney for the appellee several days after the notice of the board's action was sent to the appellee. This was admitted improperly as plaintiff's Ex. No. 7 (R. 382). This letter, on its face, indicates that it was not an action authorized by the corporation since it states:

> "Last Monday my associates, Herbert Little and George Henrye, while discussing other matters in which we are interested, formally approved that

agreement which I made with Joe Siciliano last June on Guam." (R. 379)

This letter indicates that it was an informal meeting of some of the directors and not all of the directors and was written as a personal letter to the appellee's attorney, who certainly would not have relied on such an informal statement when the resolution had been delivered to his client. It is true that a corporation can be bound by the admissions of its president, but it is Hornbook law that the authority of an agent cannot be established from the mere statements of the agent alone, particularly when they are in direct conflict with the stated actions of the corporation formally established in the minute book and presented to the appellee. See McKelvy, Evidence (Hornbook Series) (1944) at Section 280, p. 506-507. The court did not recognize the principle of the admission of an agent being used to establish his authority, but instead overruled the objection of the appellant's attorney and stated:

"THE COURT: Well, you have the president of the corporation here. Let's forget about this fiction. I think that that letter should be put in evidence." (R. 381)

This was specifically objected to by the appellant on the ground that it was a personal letter written by the witness and was outside of the scope of his authority as president of the corporation, and this objection was noted but overruled (R. 382). The court erred in admitting and using this exhibit to support its judgment and this alone should entitle the appellant to a new trial.

During the period from July 2, 1952, until April 21, 1953, the appellant continually attempted to persuade

the appellee to return to the Island of Guam so that a partnership arrangement might be consummated (R. 328). The trial court made a finding that the appellant made every reasonable effort to induce the appellee to return (R. 100). Mr. Thompson testified that he wrote to the attorney of the appellee that he would attempt to have the October 6, 1952, resolution extended to 90 or 120 days in order to give the appellee a chance to comply (R. 329). Finally, on April 21, 1953, the appellant gave up its attempts to consummate a partnership with the appellee, set forth a background of the situation in a resolution, refused to ratify or go forward with the partnership arrangement and wound up the affairs of the appellant and the appellee by offering to return to the appellee the money he had invested in the business, less any damages which his refusal to go forward might have caused them (Def. Ex. "F") (R. 344). A copy of this resolution and notice of termination was mailed to the appellee and was received by him as admitted by the pleadings (R. 48, 68). The appellant attempted to tender the appellee's money to him but was unable to do so because the appellee's assets were subject to a receivership and the situation was such that no one knew to whom the money should be formally presented (R. 269-270, 385).

The actions of the appellant in this case and all the facts establish that the corporation president was not expressly authorized to enter into a partnership agreement and that both parties were well aware of this fact.

E. The appellant is not estopped to deny that there was no formal partnership agreement.

As is pointed out in the previous section, the appellee's attorney handled this purported partnership agreement and, therefore, the appellee cannot plead ignorance of the law regarding whether Mr. Edward Thompson was authorized to enter into a partnership agreement without ratification by the Board of Directors of the appellant. Certainly the actions of the appellant in sending notice to the appellee and in keeping the appellee's attorney informed of the refusal of the Board of Directors of the appellant to ratify the agreement were not such actions that would cause the appellee to be acting in reliance upon the actions of the corporation or upon any type of apparent authority of the president of the appellant.

F. Even by the law of the Territory of Guam there was no formal partnership agreement.

We have been unable to find any cases of the Territory of Guam concerning the authority of the corporate president to enter into a partnership agreement, and, therefore, we must assume that the law of the territory of Guam follows the general authorities cited previously in this brief to the effect that the corporate president is not impliedly authorized to enter into the partnership agreement.

The statutes of the territory of Guam provide that foreign corporations are held to the same extent as domestic corporations for their acts, except as regards the relationship between officers and the corporation itself. Guam Civil Code Section 408.

There are no cases construing Guam Civil Code on purposes of a corporation but the California cases construing the California Code (Civil Code of California, Section 286) from which the Guam Civil Code was adopted follow the general rule that a corporation cannot enter into a partnership relationship unless expressly authorized by its charter. See *Fee v. McPhee Co.,* 31 Cal. App. 295; *Mervyn Investment Co. v. Biber,* 184 Cal. 682, 194 Pac. 1037; 20 Cal. App. 708, 130 Pac. 165. See also the general authority in 13 Am. Jur. Sections 823 and 830 and 40 Am. Jur. Section 22.

It is, therefore, the position of the appellant that either under the law of the Territory of Guam or the Law of the State of Washington, the president of the corporation must be expressly authorized to enter into a partnership agreement on behalf of the corporation and, further, that a corporation must be expressly authorized to enter into a partnership agreement on behalf of the corporation and, further, that a corporation must be expressly authorized by its charter to enter to a partnership agreement. The facts of this case establish that the president of the appellant was not authorized to enter into the partnership agreement and that the powers of the corporation did not include the right to enter into a partnership agreement. Therefore, it is necessary that the action of the corporate president be ratified by the Board of Directors of the corporation, even under the Law of Guam in order to enter into a partnership arrangement.

G. Since no formal partnership was consummated there was a joint venture or *de facto* partnership at will between the parties June 23, 1952.

The appellant is not urging in this case that it can, as a corporation, avoid any partnership liability imposed upon it under a theory of *ultra vires* action or lack of authorization of the corporate president. The appellant's position is that if a relationship was established it was an informal joint venture or partnership at will between the parties and that the rules applying to informal partnerships at will or joint ventures should be applied in this case, and, therefore, the trial court erred in referring to the formal partnership agreement for a division of profits or method of termination.

III.

The Joint Enterprise of the Parties Was Dissolved on July 1, 1952, by the Appellee's Breach and Was Wound Up on April 21, 1953, by the Appellant

A. The appellant is willing to meet its just obligations to the appellee due to his reliance on the appearance of a partnership arrangement.

As pointed out in Part I of this brief, the law of the Territory of Guam governs the effect of the actions of the appellant as a foreign corporation operating on Guam. Restatement, Conflict of Laws, Sec. 166, comment (c). The Guamanian law governing foreign corporations states that any foreign corporation lawfully doing business in Guam shall be bound by all the laws, rules and regulations applicable to domestic corporations of the same class except as to creation of the corporation or the internal relationships of stockholders,

directors and officers to the corporation, and to each other. Guam Civil Code, Section 408.

The law governing the domestic corporations on Guam provides that no enumeration in the Articles of the corporation shall have effect as a limitation upon the actual authority of the representatives of the corporation, and the corporation can be held liable as a partner to prevent injustice. Guam Civil Code Sec. 355.

The appellant's position is that there was no partnership agreement in this case but that the appellant can be held to have caused the appellee to rely upon a partnership at will or joint venture type of relationship and, therefore, to prevent injustice it can be said that a joint venture or partnership at will came into existence on June 23, 1952, when the appellee signed certain agreements with the president of the appellant and placed $15,000 in the hands of the appellant's president.

B. The joint venture or partnership at will was dissolved by the appellee's breach of his promises on July 2, 1952.

The trial court found as a matter of fact that the appellee and the impression left with the appellee by the appellant's president was that the appellee should devote his "skill and energy" to the best interests of the business of the partnership (R. 98). The court also found that the appellee was needed to manage the store and for his ability to manage it he was to be given a chance to invest $15,000 in the business and receive a 50% interest (R. 99).

The trial court in this case found as a matter of fact

that the appellee reached his agreement on July 1, 1952 (R. 103) and forced the appellant to protect itself by taking over the partnership assets (R. 108). The court found that after making every reasonable effort to induce the plaintiff to return the appellant took over the business and operated it to the complete exclusion of the plaintiff (R. 108). The court also found as a conclusion of law that the partnership of the parties was terminated by the exclusion of the appellee because of his breach and acquiescence in such exclusion (R. 113). The court also found that the partnership of the parties was dissolved by the exclusion of the appellee, because of his breach, but fixed the date of dissolution as of July 1, 1953, instead of July 1, 1952, when the appellee actually left the Island of Guam (R. 102, 112-114).

The court found that the plaintiff breached his agreement as of July 1, 1952, and this could have caused appellant damage though none was shown (R. 99-101, 103, 108).

The findings of the court that the plaintiff breached his agreement are amply supported by the weight of competent evidence and are not challenged by the appellant. The appellee's own testimony establishes that under the terms of the agreement he was to be manager of the business, and that 8 or 9 days after it opened he left the Island of Guam and was gone for approximately two years, during which period he did not at any time return (R. 148-149).

The appellant does not challenge the findings of fact of the lower court, but rather the application by the

trial court of the law to these facts. The trial court, in its opinion and later judgment, stated that the rights of the parties were governed by Section 2432 of the Guam Civil Code (R. 103). The court then stated that it would use the cases of the State of California to determine the effect of the Civil Code of Guam, since the Civil Code of Guam was taken from the Civil Code of California, with the probable express purpose that the decisions of the Supreme Court of the State of California could then be used as a background in the deciding of cases arising on the Island of Guam. *United States v. Johnson* (C.A. 9) 181 F.2d 557 (1950). The trial court properly stated that whether this is a joint venture, partnership at will or formal partnership, the rights of the party should be decided under the Uniform Partnership Act which applies to joint ventures as well as partnerships. *Zeibak v. Nasser,* 12 Cal.2d 1, 82 P.2d 375.

The appellant urges that it is, from this point on, that the trial court erred in its application of the Uniform Partnership Act as adopted on Guam because the trial court failed to distinguish between dissolution and winding up of partnership at will. The appellant has been unable to find any Guamanian cases discussing the Uniform Partnership Act which is Guam Civil Code Sec. 2395-2472, and will, therefore, refer extensively to the California decisions rendered under identical sections of the California Civil Code.

The trial court ignored the provisions of the Uniform Partnership Act which provide:

> "The dissolution of a partnership is the change in the relationship of the partners caused by any partner ceasing to be associated in the carrying on

as distinguished from the winding up of the business." Guam Civil Code, Sec. 2423.

This is to be distinguished from the winding up of the partnership affairs which is stated:

"On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed." Guam Civil Code, Sec. 2424.

This distinction between dissolution which establishes the rights of the parties in the partnership and the final termination or winding up of the business which finally distributes the assets is fundamental.

In *Fisher v. Fisher,* 83 Cal.App.2d 357, 359, 188 P. 2d 802, 804, it is stated:

"Throughout this case respondent has confused the dissolution of a partnership with the liquidation of its affairs. . . . After dissolution liquidation of the partnership follows. It does not usually precede dissolution, and because the affairs of the partnership are not entirely liquidated, and some bills remain unpaid and some property is not divided, cannot overcome satisfactory evidence of dissolution. Dissolution represents the demise of a partnership and liquidation the settlement of the estate."

See also *Shearer v. Davis,* 67 Cal. App.2d 878, 155 P.2d 708; *Meherin v. Meherin,* 93 Cal. App. 459, 209 P.2d 36.

There seems no doubt that a partner abandoning the business or ceasing to carry on his duties with respect to the business causes a dissolution thereof at that time and he cannot remain silent. As is stated in *Beck v. Cagle,* 46 Cal.App.2d 152, 162, 115 P.2d 613, 619:

" . . . the abandonment or dissolution of a part-

nership or joint venture may take place by conduct inconsistent with its continuance. . . .

"A person may not withhold his claim awaiting the outcome of an enterprise, and then, after a decided turn has taken place in his favor, assert his interest, especially where he has thus avoided the risks of the enterprise. Accordingly, if the property involved is of a speculative or fluctuating character, more than ordinary promptness is required of a claimant; he must press his claim at the earliest possible time. * * * "

See also *Richards v. Plumbe,* 116 Cal.App.2d 132, 253 P.2d 126, and *Middleton v. Newport,* 6 Cal.2d 57, 56 P.2d 508.

C. Even if the appellee had not breached his agreement causing a change in relationship in partners and a dissolution the appellant dissolved the relationship by notice.

As was pointed out in Section II of this brief, there was no formal partnership between the parties, and, therefore, this is a joint venture or partnership at will. Even under the terms of the agreement proposed by the appellee there is no definite term of partnership stated and, therefore, this could be dissolved lawfully at any time by the express will of either party. Guam Civil Code Sec. 2425 (1) (b). *Vogler v. Ingrao,* 123 Cal.App. 2d 341, 266 P.2d 826; *Burke v. Chrostowski,* 287 P.2d 805; *Maryland Casualty Co. v. Little,* 102 Cal. App. 205, 282 Pac. 968. This is well stated in the case of *Fisher v. Fisher,* 83 Cal.App.2d 357, 188 P.2d 802, 803, 804, wherein it is stated:

"The case of *Maryland Casualty Co. v. Little* (citations omitted) is as stated: 'If there is no time

prescribed by agreement for the duration of a general partnership, it may be totally dissolved by the expressed will of any partner. Section 2450 Civil Code (citations omitted). After the dissolution of a partnership one partner cannot create any new obligation in the name of the partnership. Sections 2458, 2462, Civil Code. . . . The partnership may be dissolved by agreement of the partners, or the will of one of them, where there is no fixed term of its existence. Such agreement, or the will of one, may be proven by all the circumstances of the case as well as by direct evidence. Complete cessation of partnership business and a division of all, or a major portion of its assets, without any objection, express or implied, is strong evidence of an agreement to dissolve, if not explained or refuted, it is sufficient to force the conclusion of a dissolution by agreement." (Citations omitted)

It is admitted by the pleadings that the appellant sent to the appellee a notice on October 6, 1952, informing the appellee that it would not enter into a partnership agreement with him unless he met certain conditions (R. 46 and 68). It is also admitted in the pleadings that a notice was sent to the appellee effectively settling the partnership as of April 21, 1953, and tendering to the appellee or the receiver for the appellee in the action of *Siciliano v. Siliciano,* the amount of the appellee's capital investment (R. 48 and 68). This type of termination is often done and dissolution occurs at the time the will of the party is exercised if not in controversion of the partnership agreement. *Fisher v. Fisher, supra; Vogler v. Ingrao, supra; Burke v. Chrostowski,* 287 P.2d 805.

Therefore, the appellant urges that the partnership

at will or joint venture existing between the parties due to the responsibility of the appellant toward the appellee because of its president's actions was dissolved as of July 1, 1952, by appellee's breach of its terms and by appellant's notice.

D. The silence of the appellee acted as an acquiescence in the dissolution of the partnership and the later termination.

A partner owes a duty to his partners to give notice of the acceptance or rejection of their offers of termination. This is well set forth by the California Supreme Court in the case of *Wood v. Gunther,* 89 Cal.App.2d 718, 201 P.2d 874. This provided that plaintiff might sell her interest to the remaining partners. They made an offer, either to pay $45,000 for her interest or to have her interest evaluated according to the contractual formula, as she might elect. She remained silent for nearly three months and then advised one of the partners to come to her home where he was served with a copy of the Summons and Complaint in that action. The court in stating she had accepted the offer of termination stated at p. 730:

> "The law does not permit you to play fast and loose in situations where one owes a duty to another. This is not the case of a stranger offering to buy her interest. . . . To such a person she would owe no duty to speak at all, but in this case she was one of the three fiduciary partners in a firm of persons who had a contract with one another, under which they owed duties, one to the other; and, consequently, silence made the acceptance."

See also *Meherin v. Meherin,* 93 Cal.App.2d 459, 209

P.2d 36; *Pacific Atlantic Wine, Inc., v. Duccini,* 111 Cal.App.2d 957, 245 P.2d 622.

E. The termination of the partnership agreement is not contemporaneous with the dissolution and was done without court intervention.

There is no doubt that dissolution can be complete even though the business is not immediately liquidated. *Fooshe v. Sunshine,* 96 Cal.App.2d 336, 215 P.2d 66.

It is not required that there be a division of the profits and the assets of the business immediately upon dissolution. *Fisher v. Fisher, supra; Shuken v. Cohen,* 179 Cal. 279, 176 Pac. 447; 20 Cal. Jur. 804 at Sec. 102. A partnership can be terminated or wound up informally without intervention of the court. *Griffeth v. Fehsel,* 61 Cal.App.2d 600, 607, 143 P.2d 522.

As is stated in Crane on Partnerships, Chap. 8, Section 78:

> "It is safer for a partner having a cause for dissolution, by reason of the co-partner's misconduct or breach of agreement, to petition a court for a decree of dissolution and accounting. But if he proceeds to exercise self help in such a situation, and excludes the erring partner or dissolves by notice, he is not liable for damages for his justifiable recision of the partnership agreement." Citing *Schnitzer v. Josephthal,* 122 Misc. 15, 202 N.Y.S. 77 (1923), affirmed 208 App. Div. 769, 202 N.Y.S. 952; *Reiter v. Morton,* 96 Pa. 229, 240 (1880).

This is also provided for in the Guam Civil Code which provides for a dissolution under Section 2423 of the Guam Civil Code and for a series of causes of dissolu-

tion under Section 2425 and then separately provides in Section 2426 for dissolution by decree of court.

The termination and the tender of the appellant effective April 21, 1953, was sufficient as a tender and the silence of the appellee for a period in excess of 18 months was an acceptance of this tender and termination since the strict rules of tender need not be observed when a relationship such as that which existed between the parties is present. *Pacific-Atlantic Wine, Inc., v. Duccini,* 111 Cal.App.2d 957, 245 P.2d 622; *Meherin v. Meherin, supra; Wood v. Gunther, supra.*

The appellant was entitled to use the firm name of the *de facto* partnership after dissolution because this was an asset belonging to the appellant prior to the forming of the partnership and as the surviving partner the appellant was entitled to use this name to continue the business. *Speka v. Speka,* 124 Cal.App.2d 181, 268 P.2d 129.

F. The court erred in its method of determining the amount to which the appellee was entitled after dissolution.

There would seem to be no doubt that the appellant had the right to wind up the partnership since it was not the party who wrongfully dissolved it and there was no agreement as to the partnership duration. Guam Civil Code, Section 2431.

The appellant managed the affairs of the *de facto* partnership from the time of dissolution, on July 1, 1952, until termination effective April 21, 1953, at which time the appellee was tendered his capital investment.

The trial court in this case used Section 2432 of the Guam Civil Code in conjunction with the California case of *Zeibak v. Nasser, supra,* but did not properly apply Guam Civil Code, Section 2432, which provides as follows:

> "(c) a partner who has caused the dissolution wrongfully shall have: . . .
>
> "II. If the business is continued under paragraph (2) (b) of this Section the right as against his co-partners and all claiming through them in respect of their interests in the partnership to have the value of his interest in the partnership less any damage caused to his co-partners by the dissolution, ascertained and paid to him in cash, or the payment secured by bond approved by the court, and to be released from all existing liabilities of the partnerships; but in ascertaining the value of the partners' interest in the value of the good will of the business shall not be considered."

The effect of the court's failure to recognize the difference between dissolution of the partnership and termination of the partnership or winding up caused the trial court to grant to the plaintiff a return of his capital, an amount for capital improvements paid out of profits made after the date of dissolution, the value of a building built after the date of dissolution and one-half of the net profits, most of which were earned after the date of dissolution (R. 112). The court, in its judgment, does not refer to the dissolution of July 1, 1952, nor to the termination of April 21, 1953, but refers only to a court decree of dissolution as of July 1, 1953, which the court determined was a date of dissolution.

The appellee was entitled only to have the value of his

partnership interest as of the date of actual dissolution of the business which was July 1, 1952, only nine days after the business had been started and in ascertaining the value, the value of good will of the business should not be considered. Guam Civil Code, Section 2432 (2) (c) II, *supra*. There was no indication of profits in this nine-day period, and, therefore, the appellee was entitled to a return of his capital investment less any damage suffered by the appellant for the appellee's breach of the agreement and without any amount for goodwill. This was tendered to the appellee in the termination effective April 21, 1953, which was sent to the plaintiff. See Exhibit E attached to the complaint (R. 59-67, 68).

IV.

The Appellee Was Entitled to No Profits or at Most Only a Pro Rata Share of the Profits Earned After Dissolution and Before Termination

The facts of this case establish that at the time of the opening of the Dairy Queen Store, the appellant had a paid-in capital of $43,600.00 (R. 189). The total investment of the appellant in the Dairy Queen Store on Guam, when it opened on June 22, 1952, was approximately $42,500.00 (R. 193). It is undisputed that this amount of money was devoted to the business and American Pacific Dairy Products, Inc., the appellant, has never paid any salaries to any of its employees or dividends to its stockholders or expenses in any manner other than to the Dairy Queen of Guam except for the legal expenses of incorporating (R. 325-326). It is also undisputed that the appellee paid $15,000.00 for his in-

terest in the proposed partnership (R. 323). The money which Mr. Siciliano, the appellee, gave to the appellant, was used immediately in the business. It was not repaid by the business to the appellant until October, 1952 (R. 144-145, 323). Therefore, as of June 23, 1952, the appellee had $15,000 invested in the business and the appellant had $42,500.00 invested in the business.

This situation is confused in the record by the discussions concerning the proposed partnership agreement between the appellee and Edward Thompson, the president of the appellant. The appellee refused to accept the appellant's investment as a basis for the value of the Dairy Queen assets (R. 266-267). Therefore, the proposed agreement included such things as the appellant's investment being arbitrarily reduced from $42,-500 to $38,000; the appellant carrying $8000 of the investment as an account payable, to be paid only from profits, the appellant's franchise cost wasn't used as a factor (R. 445) and appellant immediately loaned $7500.00 of the money received from appellee to the business (R. 266-268). The big element in all of these concessions by the appellant was the appellee's management (R. 266-268). The best way, therefore, to establish the proportionate contributions of each party is to take the total investment of each party. It is undisputed that the total investment of the appellant in the Dairy Queen on June 22, 1952, was approximately $42,500.00 and that all of the assets of the corporation were invested in the Dairy Queen of Guam (R. 193). It is also undisputed that the appellee invested $15,000 in the business.

A. Appellee is not entitled to share in the profits earned after dissolution.

Some cases have held that during the period between dissolution and final termination of the partnership a partner may not have a right to any of the subsequently earned profits. As is stated in 40 Am. Jur. Partnerships, Section 382:

> "The fault or bad faith of a partner may affect his right to an accounting of subsequently earned profits. Accordingly, it is held that a partner who has refused to cooperate in effecting an equitable division of the business and assets, and has rejected all offers of settlement, or has failed to supply his share of capital, or has withdrawn his capital from the firm may be denied any interest in the profits subsequently earned."

The same principle has been applied when there has been a dissolution of the firm through an abandonment of the business by one partner. As is stated in 40 Am. Jur., Partnerships, Section 383:

> "Where the dissolution of the firm is effected through the abandonment of the business by one partner it has been held that such partner is not entitled to share to the subsequently earned profits. This rule has been applied even where the other partners used the complainant's property in the business.
>
> "On the other hand, there is some authority for the view that a partner does not forfeit his right to share in subsequently earned profits by his abandonment of the business or venture. There may be circumstances under which a partner's refusal to continue the venture is justified, in which case he should not be deprived of his right to share in the subsequently earned profits."

The appellee breached his contract on July 1, 1952, and subsequent to that time refused to co-operate or even answer appellant's letters of inquiry. The appellee did not even reply to appellant's notice of termination. By the facts of this case the appellee is not entitled to any profits earned subsequently to July 1, 1952.

B. If the appellee is entitled to any profits he would be entitled to an apportionment according to the capital invested during the period from July 1, 1952, until dissolution on April 21, 1953.

The trial court erred in this case by not recognizing the dissolution on July 1, 1952, and apportioning subsequently earned according to the original *de facto* partnership agreement. This was improper as is pointed out in 40 Am. Jur., Partnerships, Section 387, wherein it stated:

> "In several cases the courts, without considering what would be the most equitable way to apportion the subsequently earned profits, and apparently without realizing that there might be some other method of apportionment, have divided the profits according to the terms of the original partnership articles, allowing the partner whose assets have been used after dissolution a full share, without regard to the extent to his interest in the capital of the concern. In those cases which have considered the matter, however, it has been uniformly held that the subsequently earned profits are not to be divided according to the terms of the original partnership articles, but are to be apportioned according to the respective capital investments of the partners."

See also 40 Am. Jur., Partnerships, Sec. 386; Annot.,

80 A.L.R. 12, at page 58, Sec. VI. The above-cited annotation has recently been cited with favor and the above rule reaffirmed in the case of *Moseley v. Moseley,* 196 F.2d 663, 665, at Note 1 (C.A. 9, 1952).

The California cases on this point follow the rule that a retiring partner is only entitled to his pro rata or proportionate share of the profits earned after dissolution. *Burke v. Chrostowski,* 287 P.2d 805; *Nuland v. Pruyn,* 99 Cal.App.2d 603, 222 P.2d 261; *Hall v. Watson,* 73 Cal. App.2d 735, 167 P.2d 210; *Painter v. Painter,* 4 Cal. Unrept. Cases 636, 36 Pac. 865, Reaffirmed 6 Cal. Unrept. cases 677, 65 Pac. 135, and *Ruppe v. Utter,* 76 Cal. App. 19, 243 Pac. 715.

Therefore, the appellee should have been entitled to $15,000 divided by ($42,500 plus $15,000) or 26% of the profits during the period from July 1, 1952, until April 21, 1953, when the business was terminated, the appellee was tendered his money and the appellant took over complete operation of the firm. This amounted to 26% of $30,823.04 or $8,013.99.

The total amount to which appellee would be entitled under this theory would be:

Capital contribution	$15,000.00
26% of net profits	8,013.99
Total	$23,013.99

V.

The Appellee Is Not Entitled to Interest on the Amount of the Judgment from July 1, 1953, to April 7, 1955

The trial court found that the appellee was entitled to interest on the amount of his capital contribution

plus interest on the profits earned to July 1, 1953, from July 1, 1953, to the date of the entry of the judgment (R. 114). The ordinary rule is that a partner settling up partnership affairs after dissolution is not subject to interest unless his conduct has been so inequitable as to give rise to a demand for interest. 40 Am. Jur., Partnerships, Section 364. This rule has been followed in the recent California case of *Speka v. Speka,* 124 Cal.App.2d 181, 268 P.2d 129.

As has been previously pointed out in this brief, the appellant tendered to the appellee in good faith the amount which the appellant considered due the appellee on April 21, 1953. The trial court found that the appellee accepted the termination and expulsion by acquiescence (R. 113). Any delay in the settlement of the appellee's rights to obtain his capital investment or profits to that date, if he believed they were due to him, is the fault of the appellee in not questioning the termination of the partnership and the amount tendered to him and not that of the appellant who, in good faith, tendered to the appellee the amount it believed due and owing to him. *Meherin v. Meherin, supra; Wood v. Gunther, supra.*

VI.

Even If the Trial Court's Theory of Law Had Been Correct, the Court's Computation of the Date of Termination Was Not Supported by the Facts.

The trial court found as a matter of fact that the appellant took full control of the business as of July 1, 1953 (R. 102, 112). As has been previously pointed out in this brief the court improperly characterized this as a dissolution.

It is admitted by both parties in the pleading that the appellant sent the appellee a notice of termination and tender of his capital investment effective April 21, 1953 (R. 46-47, 68). It is undisputed from the testimony that the new manager of the appellant, Norman Thompson, arrived on Guam on April 22, 1953, and immediately took charge of the operation by posting the books and obtaining the key to the cash register and informing the employees of his position (R. 388, 394, 413-417). The court based its Finding of Termination as of July 1, 1953, on the fact that it took the appellant from the date of Norman Thompson's arrival on the island of Guam until July 1, 1953, to establish the books of the appellant on a corporate basis (R. 425-426) and upon the testimony of Edward Thompson, the president of the appellant, that he had sent to the appellee, prior to the notice of termination, some letters indicating that Norman Thompson might help the appellee with his corporation and work with the appellee's employees (R. 445-447). This letter of Mr. Thompson was prior to the notice of termination and was, of course, prior to the taking over of the operation on April 21, 1953, and it is uncontroverted that no reports or other information were given to the appellee or a position inconsistent with the complete termination taken after the 1st of May, 1953 (R. 447).

The acts of the appellant acting by and for itself to correct its books had no relationship to the appellee. It, therefore, could not be in any way construed as entitling the appellee to profits for the months of May and June, 1953. The profits, as shown from the books, on April 30, 1953, were $30,823.04 (R. 214). The profits

to May 1, 1953, were $31,403.47 (R. 214). There was no profit figure for the period ending June 30, 1953 (R. 214). The court established an arbitrary figure of net profit for the month of June, 1953, of $2,350.00 (R. 111). The court using this $2,350.00 figure calculated a total undistributed profit as of July 1, 1953, of $33,-753.49 (R. 110-111).

This means that the court improperly allowed the appellee one-half of $2,930.45 ($1,465.22) as profits earned after the termination of the business, even if the appellee was entitled to share 50-50 in the profits during the termination period (which appellant maintains he was not).

VII.

Even If the Trial Court's Theory of Law Had Been Correct, Judgment Was Improperly Computed Based on the Facts. And Appellant Was Denied a Fair Trial in Establishment of Figure

The trial court's computation of the judgment appears in Statement of Facts and Record, p. 112.

A. Appellant was denied a fair trial by trial court's refusal to order an audit and its refusal to notify the appellant on the filing of its findings of fact and conclusions of law.

The court stated to counsel that he would suggest that they get together with the court and agree upon an accountant to establish the accounting in this matter unless counsel were willing to accept a formula as representing a basis of July 1, 1953 (R. 487). The court reserved the right to appoint a satisfactory accountant if the parties could not agree on one (R. 489). In the

interlocutory judgment entered May 2, 1955, the court decreed as follows:

> "6. That unless the parties within five days of the date hereof agree upon a mutually satisfactory accountant to audit the books of the defendant, that the court will thereafter appoint such an accountant to perform such audit." (R. 95-96)

The court then went on to provide that the appellant should produce all of its books, papers and records for the purpose of facilitating the accounting herein provided for (R. 96). The court did not ever appoint an accountant and entered its supplemental findings of fact and conclusions of law and final judgment on April 7, 1955, without having appointed an accountant and without giving the appellant notice of the entry of the findings of fact and conclusions of law and judgment or a chance to object to the entry of the judgment without having an accountant examine the books. This final judgment was based upon the figures of Henry Diza, plus an arbitrary figure of $2,350.00 for the month of June, 1953, as created by the court (R. 14805, p. 110-111). The appellant submits this was arbitrary and unfair since an audit of the books would have revealed many such errors and would have enabled the court ed out in the sections of the brief which follow this one.

B. Even if the court correctly determined the termination date and method of computing profits of the partnership, the judgment was incorrectly computed by the court.

Item (a)

With reference to the trial court's computation of the judgment (R. 112) appellant admits item (a) Return of Capital.

Item (b)

Item (b) should not have been granted to the appellee. This item represents the account payable which American Pacific Dairy Products, Inc., took from the purported partnership in return for contributing $8,000 worth of assets to the Dairy Queen. This figure was not reflected in the profits earned but was part of the contribution of the appellant to the partnership. Profits as reflected on books and given by appellee to the court were not reduced by $8,000 in order to repay this account. The court, by granting the appellee this $4,000 gave the appellee $4,000 over and above the net profits to which he was entitled on the theory that the $8,000 had reduced profit figure. Obviously, profits were not so reduced on the books because the balance sheet reflecting a reduction of cash and a reduction of accounts payable did not in any way diminish the income statement showing net profits which was used to establish the court's profit figure (R. 209-215, 222-223, 281).

Item (c)

The $1,150.00 figure under item (c) is incorrect because it is payment for a building which was never ordered by the appellant or the purported partnership, and the court is in effect forcing the appellant to purchase this building as an asset and, therefore, pay the appellee one-half of its value.

Item (d)

The figure of $16,876.75 as the net profit computed in item (d) represented one-half of the profits as taken

from the books of Henry Diza and extrapolated by the court to the extent of $2350 for the month of June, 1953, as pointed out previously. Therefore, this net profit figure is incorrect for the month of June, 1953, even if the books of Henry Diza are accepted as correct and the appellant is held until July 1, 1953, since the profits of the business were diminishing in this period (R. 213-214) and yet the court treated the profit margin as being an average over the entire period of operation (R. 111).

Pacific Enterprise Judgment

The trial court erred in its computation of the amount to be deducted for the judgment obtained by Pacific Enterprises, Inc., against the purported partnership. It was determined that the claim of Pacific Enterprises, Inc., was $7,600.83 and the court subtracted from that $1,066.28, leaving a net of $6,523,55 (R. 235). The sum of $1,066.28 was a set-off for supplies which were sold to appellee's corporation by the Dairy Queen. The court reduced the amount of the appellee's corporation's claim by this amount, which meant that this amount of $1,066.28 was taken into profit and shown as a part of the profits to be divided between appellee and appellant, and yet this was used to pay an expense of the Dairy Queen which should have been reflected on the books to reduce the net profits. This means the sum of $1,066.28 appears twice in the judgment in that it increases the profit figure and decreases the expense figure with the result that the appellee receives one-half of $1,066.28 or $533.14 to which he is not entitled even if the trial court's theory of the case is accepted.

VIII.

PACIFIC ENTERPRISE SUIT

The whole account of the appellee is not adequately proven but the account of the appellee, as allowed by the court, shows only four items are in dispute.

See Appendix "A" for a compilation of the account demanded and the amount granted by the court.

For the bills of the appellee Pacific Enterprises, Inc., see Record 14806, pages 4 and 5. For a summary of the amounts agreed to and the computation of the judgment see Record 14806, pages 225-236.

The items which are in dispute between the parties and appealed by the appellant are as follows:

Item IV—Rent for reefer truck	$ 400.00
Item XI—Load of crushed coral	24.11
Item XII—Equipment owned by Pacific Enterprises, Inc.	180.30
Building Addition (including cess pool)	2,300.00
Total	$2,904.41

A. The four items not agreed to by the appellant should be denied *in toto* as the appellant's books do not support the account.

The entire account as rendered by the appellee demonstrates that the charges contained therein were not adequately recorded, and were in most costs padded.

For example the bookkeeper of the appellee testified that he was not instructed to set up charges on the appellee's books for the reefer truck (Item IV), subsistence and housing facilities (Items I and II), and part

of the supplies issued to the Dairy Queen (Item X), until this suit was in preparation in August, 1954, sixteen months after the last of these services were rendered (R. 14805, p. 299). The bookkeeper admitted that he went back to his books and *antedated* the entries but that some items such as subsistence, which was only estimated (Item I), housing (Item II), supplies (Item (X), and Warehouse (Item VII), still do not appear on the appellee's books as a charge against the Dairy Queen (R. 14805, 300-301).

The appellee's bookkeeper testified that the maintenance items such as electrician's time and reefer mechanic's time (Item IX) were not charged to a Dairy Queen account (R. 14806, p. 167-170). The trial court established by testimony of Diza, the bookkeeper, and admission of appellee's counsel that the supplies delivered to the Dairy Queen (Item X) were not contained on charge slips issued to the Dairy Queen but only on delivery slips, part of which represented a delivery of supplies to the Dairy Queen of the Dairy Queen's own stock (R. 14806, 173-175). The appellee's counsel admitted this was not a proper way to keep books (R. 14806, p. 175-176).

Some items of the claim could not be identified by the appellee's own employees who were supposed to have prepared the charges. For example, the employees could not account for the slimline (Item II) (R. 14806, p. 14, 149, 177) and the mulch paper (Item X) (R. 14806, p. 7, 111) which were included on the bill.

The trial court stated and the appellee's counsel admitted that the bookkeeping procedures of the appellee

did not reflect the true situation between the parties in the absence of later agreements (R. 14805, p. 302-304).

The appellant urges that the entire account is not supported by the evidence and that the four items not agreed to by the appellant in open court should not be allowed to stand since the entire account is nothing more than a rough guess not supported by the evidence.

B. The evidence does not support a finding that the appellee is entitled to recover for the materials and services listed in Items IV, XI and XII.

Item IV representing the rent for a reefer (refrigerator) truck was allowed by the court to the extent of $400.00 (R. 14806, p. 225-226). This was based on the testimony of Joseph Meggo, an employee of the appellee who testified that in his opinion the truck was needed to store ice cream for the rush periods (R. 14806, p. 107-109). This was flatly contradicted by Mr. Edward Thompson, president of the appellant, who testified that there was ample storage space without using the refrigerator truck (R. 14806, p. 195, 200, 201). The trial court concluded from the testimony of appellee's employees that there was no disadvantage to the appellee in having its refrigerator truck connected and running because the truck has to be kept cold anyway (R. 14806, p. 138, 225). The trial court did not use a figure established by the appellee or by appellant's evidence, but rather made an arbitrary allocation of $400.00 to this item (R. 14806, p. 225-226). The sum of $400.00 was improperly granted to the appellee.

Item XI in the sum of $24.11 represented two loads of crushed coral which appellee's employee testified was

used for the foundation and to fill in around the building (R. 14806, 113). This employee couldn't remember a date or time (R. 14806, p. 114). The appellant's president testified that the appellant had already paid $1100.00 for crushed coral for the building and this additional coral was not ordered by and was of no benefit to the appellant (R. 14806, p. 67).

Item XII:

Item XII in the sum of $180.30 demonstrates the lack of evidence supporting the appellee's claim and the padding of the account (R. 14806, p. 8).

First, a ¾ h.p. Westinghouse motor was allowed at $70.00 which was the new invoice price (R. 14806, p. 179, 229), yet appellee's employees testified this was a rebuilt motor (R. 14806, p. 120). The appellee's employees testified that this motor was installed in the walk-in refrigerator (R. 14806, 116-117, 120); the appellant's manager testified there was not a ¾ h.p. motor anywhere in the store (R. 14806, p. 217). The trial court stated with regard to Item XII as follows:

> "THE COURT: 'Equipment owned by Pacific Enterprises, Inc., No. XII—well, you are not too far off on this. The ¾ h.p. motor I think there could be—subsequent to its installation—there could be some error on that. I think it ought to be clear if there is a Westinghouse motor in the walk-in.'
>
> MR. BOHN: I understood that there was some testimony—
>
> THE COURT: I think Norman testified it was a 2 h.p. You have the voucher. I think the probability is that you have something and I am going to allow that. I think it must be there. The condenser

is unquestioned, isn't it? The blower—where do we come out on that?'' (R. 14806, p. 228)

There seems no doubt that the court established that figure without sufficient evidence of its use or its price.

The hot fudge heater and the deep freeze are typical examples of a padding of an account and the appellees took these items back so that the appellant was not charged with them. However, to show the entire improper computation of the appellee's bill, it should be pointed out that the hot fudge heater was billed to the appellant for the sum of $101.00. Mr. Edward Thompson testified that Mr. Siciliano's hot fudge heater was second hand and produced in court a larger new hot fudge heater which appellant bought for $19.78 (R. 198). The deep freeze was not used by the appellant once it took over the store and was returned to the appellee at the time of trial (R. 218).

The air-conditioning system was a case wherein the appellant established an air-conditioning system, had it removed by the appellee with fans substituted and then was charged by the appellee for repair of the air-conditioning system. These are the items listed in Item XII as the Universal condenser, blower, air cooler, evaporator, and electric fans. Mr. Edward Thompson, the president of the appellant, testified that they had the sales room air conditioned for a charge of over $1,000.00 and then, when the appellant's manager, Norman Thompson, came to the Island of Guam, he found only electric fans operating and had to spend an additional $250.00 to $300.00 repairing the air conditioning (R. 14806, pages 68-69). This testimony is not chal-

lenged or contradicted in any way. The electric fans were returned to the appellee (R. 14806, p. 69).

It is also uncontradicted that the employees of the appellee took the blower and the air-cooled evaporator which constituted the air-conditioning system and substituted equipment of their own (R. 229). The testimony of the appellee's employee is that they took out the blower and the other air-conditioning equipment and that it is still in the possession of the appellee. The apparent reason for the change was that the air cooler evaporator did not bring in cold air (R. 14806, pp. 118-119). The appellee never returned any of this air-conditioning equipment of the appellant and these items, as allowed by the court, were improper (R. 14806, pp. 229-231). The court also allowed the appellee to collect for a carrier compressor listed in XII. Mr. Thompson testified that this was the same compressor put in originally since it was painted by the man who put it in and is still there (R. 14806, p. 229). The appellee's testimony is that a compressor was changed in the walk-in reefer but that a carrier compressor was only used to help out on air conditioning. Yet, on the same page of the record, the appellee's employee stated that a carrier compressor was installed in the reefer (R. 14806, p. 120). There seems no doubt that the appellee's employee was confused as to the installation of a carrier compressor.

C. The appellant was improperly charged with the cost of a building placed on partnership property.

The trial court allowed the appellee the sum of $2,300.00 for a building which appellee's employee built

on the Island of Guam (R. 14806, p. 233). The court's figure was not based on quantum merit, nor on the testimony of any of the witnesses but rather upon what the court determined was a reasonable value (R. 14806, pp. 234-235).

The appellee claimed the amount of $2,361.96 as the cost of the original store (R. 14806, p. 5). Therefore, the court granted almost the entire bill of the appellee though be broke down the cost of the building into $1,-500.00 for the building and $800.00 for a cesspool (R. 14806, pp. 234-235). The charges listed by the appellee in its bill were in many instances proven to be inconsistent or incorrect. For example, with regard to the amount charged for labor, the manager could not remember the names of the employees and he could not remember how many men worked there on any one day (R. 14806, pp. 163-164). With regard to the materials, the amount of cement was put in as 95 bags at a cost of $223.25 and yet the appellant's own foreman testified that they did not use 95 bags, but at the most, only about 50 or 60 bags (R. 14806, pp. 150-151). The appellee carried the entire building on its books at a value of $861.16 (R. 14806, p. 205).

The appellee did not carry this item as an account owing by the Dairy Queen to Pacific Enterprises, Inc., on its books, but, instead, carried it as an asset account under the heading of buildings on the Pacific Enterprise books (R. 14806, pp. 207-208, pp. 210-211). This amply demonstrates that the building was built as an asset for the appellee and not for the appellant, and that the cost, as established by the court, was highly inflated.

D. The appellant did not order this building and at all times has rejected any claim to it.

The building is referred to by the president of the appellant in the case of *Joseph Siciliano v. American Pacific Dairy Products, Inc.,* where he testified that he knew nothing of the construction of the building until he got a letter from the Fuller Glass Company in San Francisco, indicating that Mr. Siciliano, the president of the appellee, had ordered glass like the previous glass ordered but that the bill be sent to his post office box address on Guam rather than to the president, in Seattle (R. 14805, p. 339). Mr. Meggo, an employee of the appellee, testified in the first case that this building was to be used for additional freezers and as an extension of the Dairy Queen store (R. 14805, p. 183). Mr. Thompson, the president of the appellant, pointed out that the building could not be used as an extension for the Dairy Queen of Guam because the waste pipe was missing, there was no conduit to bring electricity to the freezers, there was no 220 V. line coming into the store, there was a 30 amp fuse box when 60 amps were needed, where the freezer should have been it was too close to the sales window, and a sink was roughed-in at the place where the freezers would have had to be placed (R. 14805, pp. 339-340). Mr. Thompson, in the second suit, testified first and reiterated his opinion that the addition was built by Mr. Siciliano for use as a snack bar and that he only found out about the building because of the phone call of Fuller & Company (R. 14806, pp. 72-74). Mr. Thompson, the president of the appellant, testified that they did not order the building; that they did not want the building, and that

he told Mr. Siciliano they did not want it, but since Mr. Siciliano informed him that it was open and operating there was nothing they could do about it (R. 14805, pp. 75-76).

The court established through questioning of Mr. Edward Thompson and made comment that in the court's opinion the operation of an ice cream dispensary attracts a different kind of trade than a snack bar trade (R. 14805, p. 79).

When Mr. Joseph Siciliano testified, he contradicted the testimony of his employee, Mr. Meggo, and stated that the building was constructed for the sale of root beer, popcorn, sandwiches, and milk, and Mr. Siciliano, in his statement, after hearing Edward Thompson's testimony, referred to the court's comments about a different type of trade (R. 14805, pp. 85 and 90-91), and then testified this was to be a type of milk bar (R. 14806, p. 91).

Mr. Siciliano admitted that this building was going to be paid for with Pacific Enterprise money (R. 14806, pp. 93-94).

This building was constructed so that there was no entrance between the old Dairy Queen building and there still is no connection between them without leaving the back door of one and going into the back door of another (R. 14806, pp. 165-189).

This building was later moved into by Mr. Norman Thompson, the manager of the appellant, and painted to match the rest of the store and repaired so that it would not be such an eyesore and could be used for the personal residence of Norman Thompson (R. 14805, p.

341). The manager of the appellant, Mr. Norman Thompson, did not do this until 1954 and he was informed by the president of the appellant, Edward Thompson, that the appellant, American Pacific Dairy Products, Inc., claimed no interest in the building and that any repairs of the building would be at Mr. Norman Thompson's own risk just as it was at the risk of Mr. Siciliano (R. 14805, p. 341; R. 14806, p. 211). This building has been used by the manager of American Pacific Dairy Products, Inc., during this period but the appellant is not required to supply quarters to its manager and the actions of its manager in using this building were entirely at his own risk (R. 14805, p. 341; R. 14806, pp. 80-81).

IX.

The Trial Court Erred in Denying Appellant's Demand for Jury Trial

It has been established by numerous decisions that the Constitution does not follow the flag into unincorporated territories. *Downes v. Bidwell,* 182 U.S. 244, 287, 21 S.Ct. 770, 45 L.Ed. 1088; *Balzac v. People of Porto Rico,* 258 U.S. 298, 42 S.Ct. 343, 66 L.Ed. 627. The Territory of Guam has not been incorporated into the U.S. and it has been stated as dicta that since Guam has not been incorporated into the U.S., neither Section 2 of Article III, relating to trial by jury, nor the 5th, 6th or 7th amendment relating to pettit juries have any application on the Island of Guam in the absence of some Act of Congress extending an application there. *Pugh v. United States,* 212 F.(2d) 761 (C.A. 9th, 1954).

The appellant urges that the doctrine that the Constitution does not follow the flag has become outmoded due to recent social and political developments involving the rights of United States citizens abroad and, therefore, that the court re-examine the doctrine that residents of the United States operating in United States territories are not entitled to the protection of the Constitution of the U.S. It is understandable that the rights and protections offered to the citizens and persons residing in the U.S. cannot be applied in foreign territories to which the sovereignty of the U.S. does not extend but it seems only right and just that the protection of the United States Constitution should extend to Americans operating in territories of the United States which are subject to United States sovereignty.

A. The trial court erred under the statutes of the U.S. governing procedure on Guam in not granting appellant the right to a jury trial.

The Organic Act of Guam, Aug. 1, 1950, c. 512, Sec. 5, 48 U.S.C. Section 1421b, contains a "Bill of Rights" for Guam but contains no provision for trial by jury. However, Section 22 of that act, as set forth in 48 U.S.C. Section 1424, which creates the District Court of Guam and defines its jurisdiction, provides in subsection (b) for the rules to be followed by the District Court of Guam as follows:

> "The rules heretofore or hereafter promulgated and made effective by the Supreme Court of the U.S. pursuant to Section 2072 of Title 28, in civil cases; * * * shall apply to the District Court of

Guam and to appeals therefrom. August 1, 1950, c. 512 § 22, 64 Stat. 389."

The legislative enactment authorizing establishment of the Rules of Civil Procedure for the District Courts, as contained in 28 U.S.C., Section 2072, provides:

> " * * * Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution."

The Federal Rules of Civil Procedure, as established by the Supreme Court of the U.S., establish the right of trial by jury in Rule 38 of the Rules of Civil Procedure, Title 28 U.S.C. as follows:

> "Rule 38a *Right Preserved.* The right of trial by jury as declared by the 7th Amendment to the Constitution or as given by a Statute of the U.S. shall be preserved to the parties inviolate."

Therefore, it is established that not only do the Federal Rules of Civil Procedure, which are in effect in the District Court of Guam, established that the right to jury trial is preserved as a procedural right but this right was specifically declared to be preserved by Act of Congress.

The above reasoning as applied to the Federal Rules of Criminal Procedure has been directly upheld by this court in the case of *Pugh v. U.S.,* 212 F.(2d) 761 (C.A. 9th, 1954), which was appealed from the District Court of Guam.

B. The appellant properly demanded a jury trial under Federal Rule of Civil Procedure, Section 38, in Cause No. 14806 on February 9, 1955 (R. 240) (R. 39).

The time for filing a demand for jury trial is within 10 days from the filing of the last pleading directed to the issue. When there are co-defendants this is 10 days after the filing of the answer of the last co-defendant as to issues of joint liability. *Spiro v. Pennsylvania R.* Co., 3 F.R.D. (1942). In the case of *Pacific Enterprises v. American Pacific Dairy Products, Inc.,* and *Joseph Siciliano,* the co-defendant, Joseph Siciliano, did not file an answer to the complaint prior to February 9, 1955, and, therefore, the appellant American Pacific Dairy Products, Inc., was not required to file its demand for jury trial until after the answer of its co-defendant Joseph Siciliano had been filed.

X.

The Court Abused Its Discretion in Denying Appellant's Motion for a Change of Venue and Motion for a Continuance and Thus Prevented the Appellant from Having a Fair Trial in Both Cause 14805 and Cause 14806

The appellant filed a motion for a change of venue on the ground of convenience of the parties and witnesses and in the interest of justice in both causes (R. 14805, p. 32; R. 14806, p. 17). This motion was supported by affidavits of Norman Thompson and Fenton J. Felan, Jr., establishing that the officers of the corporation maintained their records and business in Seattle, Washington, and that the records and books of account of the appellant were maintained in that area and that the

majority of the witnesses for the defense and other records were situated in the City of Seattle. The court denied this motion and the matter moved rapidly to trial. The appellant was unable to obtain some of its records, and, therefore, on February 9, 1955, moved for a continuance which was the first and only continuance requested by either party (R. 14806, p. 240). This was denied by the court and the matter was tried on February 17, 1955. It was brought out at the trial that the defendant did not have some of its records available for the reason that they had not arrived from the United States though they had been mailed a considerable period of time prior to the trial (R. 14805, pp. 215-218). The appellant was not able to produce some of these records since they did not come from the United States in time, and, therefore, appellant was denied a fair trial through the court's refusal to change the venue of this action or grant a continuance to the appellant.

XI.

The Appellant Was Denied a Fair Trial in Cause 14806 [*Pacific Enterprises, Inc., v. American Pacific Dairy Products, Inc.*, and *Joseph Siciliano*] Since the Same Attorneys Represented Both Plaintiff and One of the Defendants

The attorneys representing Joseph Siciliano in both of these actions were John Bohn and Robert E. Duffy. These attorneys represented the plaintiff Pacific Enterprises, Inc., in Cause No. 14806. The defendant moved for a severance of the trials of *Joseph Siciliano v. American Pacific Dairy Products* and *Pacific Enterprises, Inc., v. American Pacific Dairy Products, Inc.,*

and Joseph Siciliano because of this representation by the same attorneys of both sides of one of the cases (R. 14806, pp. 40-41). This was denied by the trial court.

To show the difficulty with which the appellant was faced the co-defendant Joseph Siciliano in Cause No. 14806 did not file an answer and was very hostile to the defense of the appellant and since the same attorneys represented both the plaintiff and the defendant in this case the appellant was unable to properly present its defense. The appellant, therefore, urges that if the cause is not reversed for the grounds stated previously in this brief, that the court grant a new trial to the appellant in Cause No. 14806 on the ground that appellant did not receive a fair trial since the same attorneys represented both the plaintiff and one of the co-defendants in Cause No. 14806.

CONCLUSION

We submit the trial court's decisions are erroneous in both Cause No. 14805 and Cause No. 14806 and that the decisions should be reversed with instructions to the court below to reduce the judgment in Cause No. 14805 from $34,376.95, plus interest, to $15,000, and that the judgment in Cause No. 14806 be reduced from $6,534.55 to $3,630.14.

Respectfully submitted,

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APPENDIX "A"

	Bill of Mar. 31, '54	*Bill of Aug. 1, '53*	*Amount Allowed by the Court*
I Subsistence	$ 975.85	$ 2,031.30	$ 2,996.15
II Housing	67.30	398.00	465.30
III Transportation		600.00	.....
IV Rent for reefer truck		1,012.50	400.00
V For hauling supplies		146.25	146.25
VI Delivery of Supplies to Dairy Queen		146.25	146.25
IV For storage of supplies		361.70	315.00
III For freezing		77.00	75.00
XI For maintenance		616.07	344.34
X For Supplies Issued to Dairy Queen from Pac. Enterprise own stock		160.02	27.16
XI Other expenses		24.11	24.11
XII Equipment owned by Pac. Enterprise, Inc.		771.60	180.30
III Other Salaries	90.00	3,966.65	90.00
Employee advances, Balmonte	130.20		90.97
ost of Additional Store			
[Labor		1,433.44	
[Materials Used		1,928.52	
			$ 2,300.00
otal Owing	$1,263.35	$13,673.41	$ 7,600.83
ess Mdse. bought from Dairy Queen		1,066.28	1,066.28
	$1,263.35	$12,607.13	$ 6,534.55